

**KC Chan Brothers Development Sdn Bhd v
Tan Kon Seng & Ors**

HIGH COURT (TEMERLOH) — CIVIL APPEALS NO 11-1 OF 2000 TO 11-
26 OF 2000

RAMLY ALI JC

7 SEPTEMBER 2001

Civil Procedure — *Appeal — Appeal to High Court — Appellate civil jurisdiction of High Court — Amount of subject matter less than RM10,000 — Whether question of law raised — Issue of jurisdiction must be complied with strictly — Whether High Court had jurisdiction to hear appeal — Courts of Judicature Act 1964 ss 27 & 28(1)*

Land Law — *Housing developers — Certificate of fitness — Claim for defect or non-compliance with specifications — Whether right to claim depend on issuance of certificate of fitness — Common law breach of contract applied*

Land Law — *Housing developers — Defect liability clause — Whether to comply with before initiating claims — Building plans — Whether must be annexed to sale and purchase agreement — Sale and purchase agreement in statutory form, Schedule E — Whether can amend — Building Plan deemed incorporated — Housing Developers (Control and Licensing) Regulations 1982 (now amended in 1989)*

Land Law — *Housing developers — Sale and purchase agreement — Building plans — Whether must be annexed to sale and purchase agreement — Sale and purchase agreement in statutory form, Schedule E — Whether building plan deemed incorporated into agreement — Housing Developers (Control and Licensing) Regulations 1982*

The appellant ('the defendant') appealed against 26 decisions of the learned magistrate in favour of 26 different respondents ('the plaintiffs') arising from 26 separate civil suits. The plaintiffs were house buyers for low-cost houses built by the defendant at Taman Seraya, Triang, Pahang Darul Makmur. For that purpose, the plaintiffs had entered into their respective sale and purchase agreements ('the agreements') with the defendant. The plaintiffs filed their claims separately in the Magistrate Court Temerloh, claiming for compensation on the ground that their houses were not built in accordance with the specifications provided in the approved plans, which were part of the agreements. The learned magistrate decided in favour of the plaintiffs and found that the defendant was in breach of the respective agreements. The magistrate further awarded the plaintiffs the sum of RM8,400 together with costs and interest as compensation to the plaintiffs who purchased the single storey houses and the sum of RM4,500 together with costs and interest as compensation to the plaintiffs who purchased the double storey houses. The defendant appealed against the decisions separately and had filed 26 notices of appeal. At the hearing, both parties agreed to submit their written submission which would be applicable for all the 26 appeals ('the appeals') as all the appeals involved the same set of facts and issues. The issues before the court were: (i) whether the

- A decisions were appealable, having regard to s 28(1) of the Courts of Judicature Act 1964 ('the Act'); (ii) whether the plaintiffs must comply with cl 23 of the agreements (which provided for the issuance of written notice of defects by the purchasers) before initiating their claims in court; (iii) whether based on regulation 11(1) of the Housing Developers (Control and Licensing) Regulations 1982 ('the 1982n Regulations'), a copy of the approved building plan must be annexed to the agreements; (iv) whether upon issuance of the Certificate of Fitness for Occupation, the plaintiffs were entitled to claim compensation for non-compliance with the specifications.
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- C **Held**, dismissing the appeals:
- D (1) The amount of dispute or the value of the subject matter in all the appeals was below RM10,000 and by virtue of ss 27 and 28(1) of the Act, the High Court had no jurisdiction to hear these appeals except on a question of law. This question of jurisdiction must be complied with strictly. Non-compliance with the provisions was fatal and would nullify the appeal. Therefore, the court must be satisfied that the appeal was only on a question of law, ie it involved issue on question of law raised by the defendant to be determined and decided by this court. For that purpose, the court had to scrutinize the notice of appeal as well as the memorandum of appeal to see whether any question of law had been raised by the appellant. The court was satisfied that issues (ii) to (iv) were issues of law for the court to consider (see pp 643A–C, E, 644F–I).
- E
- F (2) The failure on the part of the plaintiffs as house buyers to issue any notice under cl 23 of the agreements did not preclude them from initiating their civil claim under the common law for breach of contract against the defendant in court. Consequently, the question of estoppel as raised by the defendant did not arise (see p 646H).
- G (3) From the recitals to Sch E of the 1982 Regulations, the approved building plan must be attached or annexed to the sale and purchase agreement and forms part of the agreement as the second schedule. Since the agreement was in the statutory form and by law, the approved building plan need to be annexed to the sale and purchase agreement, therefore the plan must be deemed to have been annexed and incorporated into the agreement although in actual fact the plan was not annexed to the sale and purchase agreement at all. Thus, the provisions and specifications contained in the approved building plan must be deemed to form part of the agreement and bind the parties concerned (see p 648C–F).
- H
- I (4) The rights of the plaintiffs to claim compensation for any defect or non-compliance with the specification did not depend on the issuance of the certificate of fitness. These rights were provided

under cl 23 to the sale and purchase agreement as well as under the common law for breach of contract (see p 649F).

A

[Bahasa Malaysia summary]

Perayu ('defendan') telah membuat rayuan terhadap 26 keputusan-keputusan majistret yang arif yang menyebelahi 26 responden-respon-
 den yang berbeza ('plaintif-plaintif') yang timbul daripada 26 guaman-guaman sivil yang berasingan. Plaintif-plaintif merupakan
 pembeli rumah-rumah kos rendah yang dibina oleh defendan di Taman Seraya, Triang, Pahang Darul Makmur. Bagi tujuan tersebut, plaintif-plaintif telah memasuki perjanjian jualbeli masing-masing dengan defendan. Plaintif-plaintif telah memfailkan tuntutan-tuntutan mereka secara berasingan di Mahkamah Majistret Temerloh, menuntut pampasan atas alasan bahawa rumah-rumah mereka tidak
 dibina menurut spesifikasi yang diperuntukkan di dalam pelan-pelan yang diluluskan, yang merupakan sebahagian daripada perjanjian-perjanjian tersebut. Majistret yang arif telah membuat keputusan yang menyebelahi pihak plaintif-plaintif dan mendapati bahawa defendan telah melanggar perjanjian-perjanjian masing-masing. Majistret seterusnya mengawardkan plaintif-plaintif sejumlah RM8,400 berserta dengan kos dan faedah sebagai pampasan kepada plaintif-plaintif yang telah membeli rumah-rumah satu tingkat dan sejumlah RM4,500 berserta kos dan faedah sebagai pampasan kepada plaintif-plaintif yang telah membeli rumah-rumah dua tingkat. Defendan telah membuat rayuan terhadap keputusan-keputusan tersebut secara berasingan dan telah memfailkan 26 notis-notis rayuan. Semasa perbicaraan, kedua-dua pihak telah bersetuju untuk mengemukakan penghujahan bertulis mereka yang akan meliputi semua 26 rayuan tersebut ('rayuan-rayuan tersebut') kerana semua rayuan tersebut melibatkan set fakta-fakta dan persoalan-persoalan yang sama. Persoalan-persoalan yang dihadapi ke mahkamah adalah: (i) sama ada keputusan-keputusan tersebut boleh dibuat rayuan, dengan mengambilkira s 28(1) Akta Kehakiman Mahkamah 1964 ('Akta tersebut'); (ii) sama ada plaintif-plaintiff mesti mematuhi kl 23 perjanjian-perjanjian tersebut (yang memperuntukkan agar dikeluarkan notis bertulis oleh pembeli-pembeli) sebelum memulakan tuntutan-tuntutan mereka di mahkamah; (iii) sama ada berdasarkan peraturan 11(1) Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Perlesenan) 1982 ('Peraturan-Peraturan 1982 tersebut'), sesalinan pelan bangunan yang diluluskan mestilah dilampirkan bersama perjanjian-perjanjian tersebut; (iv) sama ada setelah mengeluarkan Sijil Kelayakan Penghunan, plaintif-plaintif berhak untuk menuntut pampasan kerana ketidakpatuhan spesifikasi tersebut.

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Diputuskan, menolak rayuan-rayuan tersebut:

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- (1) Jumlah pertikaian atau nilai perkara pokok dalam semua rayuan tersebut adalah di bawah RM10,000 dan menurut ss 27 dan 28(1)

- A Akta tersebut, Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar rayuan-rayuan tersebut kecuali atas persoalan undang-undang. Persoalan tentang bidang kuasa ini mestilah dipatuhi dengan ketat. Ketidakpatuhan dengan peruntukan-peruntukan tersebut adalah mudarat dan akan membatalkan rayuan tersebut. Oleh itu, mahkamah mestilah berpuas hati bahawa rayuan tersebut hanya mengenai satu persoalan undang-undang, iaitu ia melibatkan isu undang-undang yang ditimbulkan oleh defendan yang perlu ditentukan dan diputuskan oleh mahkamah ini. Bagi tujuan tersebut, mahkamah harus meneliti notis rayuan tersebut dan juga memorandum rayuan untuk melihat sama ada apa-apa persoalan undang-undang telah ditimbulkan oleh perayu. Mahkamah berpuas hati bahawa persoalan-persoalan (ii) hingga (iv) merupakan persoalan-persoalan undang-undang untuk mahkamah mempertimbangkan (lihat ms 643A–C, E, 644F–I).
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- C
- D (2) Kegagalan di pihak plaintif-plaintif sebagai pembeli-pembeli rumah untuk mengeluarkan apa-apa notis di bawah kl 23 perjanjian-perjanjian tersebut tidak menghalang mereka daripada memulakan tuntutan sivil mereka di bawah *common law* untuk pelanggaran kontrak terhadap defendan di mahkamah. Akibatnya, persoalan tentang estoppel sebagaimana yang ditimbulkan oleh defendan tidakpun timbul langsung (lihat ms 646H).
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- F (3) Daripada resital kepada Jadual E Peraturan-Peraturan 1982 tersebut, pelan bangunan yang diluluskan mestilah disertakan atau dilampirkan bersama dengan perjanjian-perjanjian jualbeli tersebut dan membentuk sebahagian daripada perjanjian tersebut sebagai jadual kedua. Memandangkan perjanjian tersebut terdapat dalam borang statutori dan undang-undang kecil, pelan bangunan yang diluluskan hendaklah dilampirkan kepada perjanjian jualbeli tersebut, oleh itu pelan tersebut mestilah dianggap telah dilampirkan dan dimasukkan ke dalam perjanjian tersebut walaupun pada hakikatnya pelan tersebut tidak langsung dilampirkan kepada perjanjian jualbeli tersebut. Oleh itu, peruntukan-peruntukan dan spesifikasi-spesifikasi yang terkandung di dalam pelan bangunan yang diluluskan tersebut mestilah dianggap telah membentuk sebahagian daripada perjanjian tersebut dan mengikat pihak-pihak yang berkaitan (lihat ms 648C–F).
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- H
- I (4) Hak-hak plaintif-plaintif untuk menuntut pampasan untuk apa-apa kecacatan atau ketidakpatuhan dengan spesifikasi tersebut tidak bergantung kepada keluaran sijil kelayakan. Hak-hak tersebut diperuntukkan di bawah kl 23 perjanjian jualbeli dan juga di bawah *common law* untuk pelanggaran kontrak (lihat ms 649F).]

Notes

For cases on appeal to the High Court, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 600–613.

For cases on housing developers generally, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2132–2477.

For cases on certificate of fitness, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2444–2445.

For cases on sale and purchase agreement, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2470–2475.

Cases referred to

Chua Ena Hong & Anor v Palm Springs Development Sdn Bhd [2001] 6 MLJ 463 (refd)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 (refd)

Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors [1995] 4 MLJ 328 (refd)

Kannaya & Anor v Teh Swee Eng [1994] 1 MLJ 508 (refd)

Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant) [1994] 2 MLJ 187 (refd)

Sulaiman bin Mohamad v Malayan Banking Bhd [1992] 2 MLJ 116 (refd)

Tan Yang Long & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289 (refd)

Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 MLJ 663 (refd)

Tiang Kwong Ee v Ing Kai Hong (S) Sdn Bhd [2000] 5 MLJ 756 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 27, 28

Housing Developers (Control and Licensing) Act 1966

Housing Developers (Control and Licensing) Regulations 1982

Uniform Building By Laws 1984

AM Sebastian (Bastian Pius Vendargon with him) (Anthony Sebastian & Co) for the appellant.

Francis Tan (Rosni Francis Tan & Ho) for the respondents.

Ramly Ali JC.: These are 26 appeals filed by the same appellant/defendant against 26 decisions of the learned Magistrate Temerloh made on 29 January 2000 in favour of 26 different respondents/plaintiffs arising from 26 separate civil suits. The appellant/defendant has filed 26 appeal notices on 10 February 2000 and later followed by 26 memorandum of appeal in respect of each decision.

Factual background

All the respondents/plaintiffs were house buyers for low cost houses built by the appellant/defendant at Taman Seraya, Triang, Pahang Darul Makmur.

- A** For that purpose, all the respondents/plaintiffs had entered into their respective agreements with the appellant/defendant. Out of the 26 respondents/plaintiffs, 13 of them were buyers for single storey low cost houses while the other 13, were buyers for double storey low cost houses. All the respondents/plaintiffs filed their claims separately against the appellant/defendant in the Magistrate Court Temerloh, claiming for compensation on the ground that their houses were not built in accordance with the specifications provided in the approved plans, which were part of the agreements. They claimed that the appellant/defendant had breached the agreements between them.

C For the single storey houses, the approved plan provides for the following:

- (a) the height of the house shall be ten ft from floor to ceiling;
(b) asbestos ceiling — to be installed;
(c) water PCC Vent — two layers;
(d) Roof rafters shall be from hardwood — size 2' x 4';
D (e) 'hardcore' flooring;
(f) septic tank wall — nine inches thick.

On delivery of the said houses, the respondents/plaintiffs found the following:

- E** (a) the height of the house, from floor to ceiling was only nine feet;
(b) no asbestos ceiling installed;
(c) water PCC Vent — only one layer;
(d) roof rafters — were of various sizes and not from hardwood;
F (e) no 'hardcore' flooring;
(f) septic tank wall — only $4\frac{3}{4}$ inches thick.

For the double storey houses, the approved plan provides for the following:

- (a) the height of the house shall be 20 ft from floor to ceiling;
G (b) asbestos ceiling to be installed;
(c) septic tank wall — nine inches thick.

On delivery, the respondents/plaintiffs found the following:

- (a) the height of the house from floor to ceiling was only 18 ft;
H (b) no asbestos ceiling installed ;
(c) septic tank wall — only $4\frac{3}{4}$ inches thick.

- I** The appellant/defendant disputed the claim. The first case went on for full trial where the respondent/plaintiff (in that case) has called 16 witnesses. At the end of the respondent's/plaintiff's case (in that case) both counsels for the respondents/plaintiffs and counsels for the appellant/defendant agreed that the facts and evidence adduced in the first case be also applicable to the other 25 cases. Along that line, the defence who has called three witnesses

in the first case, was also to be applicable to all the other 25 cases as agreed by the parties. A

At the end of the trial, the learned magistrate decided in favour of all the respondents/plaintiffs and found that the appellant/defendant was in breach of the respective agreements. In respect of the single storey houses, the respective respondents/plaintiffs were awarded a sum of RM8,400 as compensation together with costs and interests (for each of them). While in respect of the double storey houses, each of the respective respondents/plaintiffs were awarded a sum of RM4,500 as compensation together with costs and interests. B

The appellant/defendant, not being satisfied with all the 26 decisions, appealed to this court against all the 26 decisions separately and thus had filed 26 notices of appeal. C

At the hearing of this appeal, both parties agreed to submit their written submissions which would be applicable for all the 26 appeals, as all the appeals involved the same set of facts and issues.

Whether the said decisions are appellable — s 28(1) of the Courts of Judicature Act 1964 D

It is not disputed that each and everyone of the 26 decisions involved award of less than RM10,000.

The amount in dispute or the value of the subject matter is less than RM10,000. E

The appellate civil jurisdiction of the High Court in respect of appeals from subordinate courts is governed by ss 27 and 28 of the Act. Section 27 of the Act provides:

The appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided. F

Section 28(1) of the Act provides:

Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law. G

For the purpose of s 28(1) of Act, the amount in dispute or value of the subject matter shall not include interests and costs. It only refers to the main award. This finding is supported by the decision of Penang High Court in *Kannaya & Anor v Teh Swee Eng* [1994] 1 MLJ 508, where it was held that: H

The value of the subject matter referred to in s 28(1) of the Act does not include interest and costs. To interpret otherwise would be to place an unnecessary burden on plaintiff who would have to decide in the first instance in which court to institute proceedings and further to guess as to when his case would be disposed of and its outcome. It cannot have been the intention of the legislature to have enacted this provision to invite the plaintiff to first indulge in a guessing game as to the ultimate outcome of his action for the purpose of deciding in which court to institute proceedings. I

- A Thus, based on the above finding, it is clear that the amount in dispute or the value of the subject matter in all the 26 appeals before this court is below RM10,000. It is also clear that by virtue of ss 27 and 28(1) of the Act, the High Court has no jurisdiction to hear these appeals except on a question of law. This is a question of jurisdiction which must be complied with strictly. It goes to the very core of the court's power in dealing with the appeal. Non-compliance with the provisions is fatal and would nullify the appeal. It is not a mere irregularity which can be cured by any other existing rules. It is a vital question to be determined and decided by the court at the beginning of the proceeding whether or not the respondent or any other party has raised it. The fact that the respondent does not raise the issue at the beginning of the proceeding does not mean that the court has the jurisdiction to hear the appeal even though the conditions set under s 28(1) of the Act are not fulfilled.
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That being the case, it is necessary at this stage for this court to be satisfied that the appeal is only on a question of law, ie it involves issue on question of law raised by the appellant/defendant to be determined and decided by this court. It only covers issues on questions of law alone, nothing else.

- D
- E Issues involving question of fact or that relate to the application of the law to the facts are clearly outside the jurisdiction of this court (see *Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187 and *Tiang Kwong Ee v Ing Kai Hong (S) Sdn Bhd* [2000] 5 MLJ 756).

- F For that purpose, the court has to scrutinize the notice of appeal as well as the memorandum of appeal to see whether any question of law has been raised by the appellant. There must be some form of indication (ie general indication) in the notice of appeal as well as the memorandum of appeal that a question of law has been raised. It need only be in general and need not be specific. In *Sulaiman bin Mohamad v Malayan Banking Bhd* [1992] 2 MLJ 116, Lamin J (as he then was) held at p 119:

- G I am of the view that in the case of an appellant intending to appeal on a question of law, the notice of appeal in Form 140 must state at least in general form the question or questions of law that he wishes to appeal on.

In another case, *Mohamad Safuan bin Wasidin*, Abdul Malik Ishak JC (as he then was) has also ruled:

- H In my judgment, in the case of an appellant intending to appeal from the decision of the subordinate court where the quantum is less than RM10,000, the notice of appeal in Form 140 must state generally the question or questions of law that he wishes to appeal on. Any failure to conform to this basic statutory requirement would strike at the very core of the appeal and, consequently, would nullify the appeal. For the reasons adumbrated above, I dismissed the appeal with costs.

- I The same ruling was also made by Tee Ah Sing J in *Ting Kwong Eee v Ing Kai Hong (S) Sdn Bhd*. In that case he concluded:

The failure to state in the notice of appeal in Form 140 the question or questions of law involved was fatal and would nullify the appeal.

In that case, the judge dismissed the appeal with costs on the ground that the appellant's notice of appeal did not state generally the question or questions of law that he wishes to appeal on.

In what format then, the question of law need to be stated in the notice of appeal? All the above authorities have stated that the question of law must be stated, at least in general form in the notice of appeal, but none has touched on the format of the statement. Form 140 itself does not help in this matter. The counsel for the respondents/plaintiffs contended the question of law must be formulated in the form of 'question' to be answered by the court by using the opening word 'whether ...'. He further contended that the questions of law should not be in the form of a statement which says that 'The learned magistrate has erred in law ...' or 'The learned magistrate did not take into consideration issues and question of law ...'.

Since there is no specific provisions or guidelines as to how a question of law need to be stated in the notice of appeal, then the court has to peruse the notice of appeal as well as the memorandum of appeal in detail in order to be satisfied that in substance a question of law alone has been raised. How and in what format the question was raised or stated is not that important. The substance is what matters. In this regard, I am in full agreement with Selventhiranathan JC (as he then was) in *Kanaya's* case where at p 513 he said:

I also found that the second ground of objection to the appeal by learned counsel for the respondent has merit. I have perused the memorandum of appeal in detail and compared it with the grounds of judgment of the learned magistrate. Having done so, I am satisfied that all the grounds of appeal in the memorandum at best relate to the application of the law to the facts and do not involve any question of law alone for decision. Labelling the grounds of appeal as involving questions of law does not metamorphose what are essentially questions of fact into questions of law. The substance is what matters, not the label.

In the present case, after going through the notices of appeal as well as the memorandum of appeal in detail, I am satisfied that, in substance, there are questions of law raised by the appellant/defendant for court's decision. The issues are as follows:

- (a) whether the respondents/plaintiffs must have complied with the provisions of cl 23 of the sale and purchase agreement first before initiating their claims in court;
- (b) whether the magistrate can award compensation exceeding the maximum amount specified in the statement of claim;
- (c) whether, based on the interpretation of Regulation II (I) of the Housing Developers (Control and Licensing) Regulations 1982, a copy of the approved building plan must be attached/annexed to the sale and purchase agreement; and
- (d) whether, upon issuance of the certificate of fitness for occupation ('CFO'), the respondents/plaintiffs are entitled to claim compensation from the appellant/defendant for non-compliance with the specifications or any other defect to the house.

- A The appellant/defendant has listed 12 issues in the notice of appeal and 21 issues in the memorandum of appeal. Except for the four issues which I have listed above that involved questions of law alone, all the other issues raised by the appellant/defendant do not involve any question of law alone for decision. At best, those issues relate to the application of the law to the facts on the case. To my mind all those issues involve question's of fact
- B which were decided by the learned magistrate after having heard all the witnesses. Whether to accept or reject their evidence, is a matter clearly within his province as long as he had valid reasons to do so. So, by virtue of ss 27 and 28(1) of the Act, this court has no jurisdiction to entertain and to consider those issues. For the purpose of these appeals, I shall only deal with the four issues which I have cited above.
- C

First issue: Whether the respondents/plaintiffs must have complied with the provisions of cl 23 of the sale and purchase agreement first before initiating their claims in court

- D Clause 23 deals with defect liability period. In full, cl 23 provides:

- E Any defects shrinkage or other faults in the said building which shall become apparent within a period of twelve (12) calendar months after the date of handing over of vacant possession, with connection of water and electricity supply to the said building, to the purchaser and which are due to defective workmanship or materials or the said building not having been constructed in accordance with the plans and description as specified in the Second and Fourth Schedule as approved or amended by the appropriate authority shall be repaired and made good by the vendor at its own cost and expenses within thirty (30) days of its having received written notice thereof from the purchaser and if the said defects, shrinkage or other faults in the said building have not been made good by the vendor, the purchaser shall be entitled to recover from the vendor the cost of repairing and making good the same and the purchaser may deduct such costs from any sum which has been held by the vendor's solicitor as stakeholder for the vendor PROVIDED THAT the purchaser shall, at any time after expiry of the said period of thirty (30) days, notify the vendor of the cost of repairing and making good the said defects, shrinkage or other faults before the commencement of the works and shall give the vendor an opportunity to carry out the works himself within fourteen (14) days from the date the purchaser has notified the vendor of his intention to carry out the said works.
- F
- G

Ground (c) of the notice of appeal states that:

- H Keputusan Tuan Majistret tidak mengambil kira isu tentang kegagalan plaintiff/responden atas Fasal 23 Perjanjian dan soal undang-undang sama ada plaintiff berhak menuntut ganti rugi tanpa mematuhi Fasal 23 tersebut.

- I I have studied the grounds of decision by the learned magistrate (at pp 508–535 of the appeal records) and fully satisfied that the learned magistrate has appropriately considered the issue relating to cl 23 and has ruled that the respondents/plaintiffs need not issue the said notice under the clause, before taking their actions to court. The appellant/defendant also argued that all the respondents/plaintiffs have failed to give any notice to the appellant/defendant under cl 23, thus they are estopped from taking any action

against the appellant/defendant in court. With respect, I cannot agree with this agreement.

All the relevant sale and purchase agreements in these appeals were signed between the respondents/plaintiffs and the appellant/defendant in 1990. These agreements were governed by the provisions of the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder. At that time (1990), the relevant regulations were the Housing Developers (Control and Licensing) Regulations 1982 (the 1989 Regulations only come into force after 1990). Regulation 12(1) of 1982 Regulations provides that every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant there to shall be in the form prescribed in Sch E. Regulation 12(2) further provides that no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the prior approval of the controller. In other words, all provisions in the sale and purchase agreement are actually statutory requirements which must strictly be complied with cl 23, particularly is meant to be as an additional protection for house buyers, without effecting or limiting their rights under the common law. This finding was clearly confirmed by the Privy Council in *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 where Lord Templeman has expressed (at p 72):

But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

The same cl 23, has been dealt with by Peh Swee Chin FCJ in *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 where he has said:

I share the view espoused by Lord Denning in *Hancock & Ors v BW Brazier Ltd* [1966] 2 All ER 901: [1966] 1 WLR 1317, to the effect that such clause similar to cl 23 in our instant appeal about making good structural defects discovered within six months, would not take away the right to sue in respect of such defects which were not discoverable within such six months, and that further in regard those defects discovered within the six months, the provision of an express remedy of making good the same defects will not ipso facto take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl 23 provides for 12 months instead of six months. The same principles would apply. Thus, the said line of defence also fails.

On those authorities, I am of the view that the failure on the part of the respondents/plaintiffs as house buyers to issue any notice under cl 23 of the sale and purchase agreements did not preclude them from initiating their civil claim under the common law for breach of contract against the appellant/defendant in court. Consequently, the question of estoppel as raised by the appellant/defendant does not arise.

Second issue: Whether the magistrate can award compensation exceeding the maximum amount specified in the statement of claim

- A Originally, all the respondents/plaintiffs had limited their claim to not more than RM5,000 as stated in their respective statements of claim. Thus on that ground, the appellant/defendant contended that the magistrate cannot award compensation exceeding the amount. The appellant/defendant further submitted that the magistrate has erred in law when he awarded a sum of RM8,460 as compensation to each of the 13 respondents/plaintiffs
- B who are house buyers in respect of single-storey houses. I have scrutinized the notes of evidence as well as the grounds of decisions of the learned magistrate and the pleadings, and I found out that eventhough initially all the respondents/plaintiffs have limited their claim to not more than RM5,000 each, however, in para 5 of the amended statements of defence,
- C the appellant/defendant has stated that the respondents/plaintiffs have no right to limit their claim. as specified in para 8 of their statements of claim. On that ground, the counsel for the respondents/plaintiffs, at the magistrate court stage, admitted and agreed that the respondents/plaintiffs have no right to limit the amount of their compensation and submitted that the court then should be at a liberty to consider the amount of compensation
- D based on the civil jurisdiction of a magistrate courtmagistrate to make an award of up to RM25,000, if damages are proven. In the premise, the limit initially stated by the respondents/plaintiffs in para 8 of their respective statements of claim, has been abandoned and of no effect. Thus, the learned magistrate, after being satisfied that damages have been proven, was entitled to make an award of up to RM25,000. Therefore, the allegation
- E that the learned magistrate has given awards of compensation exceeded the amount specified in the statements of claim should not arise at all.

- F Third issue: Whether, based on the interpretation of reg 11(1) of the Housing Developers (Control and Licensing) Regulations 1982, a copy of the approved building plant must be annexed to the sale and purchase agreement

- G In this issue, the appellant/defendant cited reg 11(1) of the Housing Developers (Control and Licensing) Regulations 1989 as the basis of the argument. In actual fact, the 1989 Regulations only came into force after 1990, ie after all the relevant sale and purchase agreements were duly signed by all the parties. Thus the 1989 Regulations were not applicable to those sale and purchase agreements. The relevant regulations that were applicable at the time when those sale and purchase agreements were signed, were the 1982 Regulations, ie the Housing Developers (Control and Licensing) Regulations 1982. However the provisions of reg 11(1) of the 1989 Regulations which was cited by the appellant/defendant, was in effect, the
- H same with reg 12(1) of the 1982 Regulations; and the form of the sale and purchase agreement as prescribed in Sch G in the 1989 Regulations is the same with the form of the sale and purchase agreement as prescribed in Sch E in the 1982 Regulations.

- I By virtue of reg 12(1) of the 1982 Regulations, every contract of Sale for the sale and purchase of a housing accommodation shall be in the form prescribed in Sch E. Thus the sale and purchase agreements are not merely private contract between the developer and the house buyers, but are

contracts in statutory form, containing statutory requirements which must be fully and strictly complied with; and as provided under reg 12(2), no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with prior approval in writing of the controller. Regulation 14 of the 1982 Regulations further provides that any person who contravenes any of the provisions of the regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding RM5,000 or to a term of imprisonment not exceeding three years or both. In the present case, there is no evidence to show that the controller has given his written prior approval to amend the form of the sale and purchase agreement as prescribed in Sch E. Thus, the original Sch E is applicable. One of the recitals to the said Sch E states:

AND WHEREAS the vendor has obtained the approval of the building plans ('the Building Plan') from the appropriate authority, a copy of which is annexed as the Second Schedule; ...

From this recital, it is clear that the approved building plan must be attached or annexed to the sale and purchase agreement and forms part of the agreement as Second Schedule. It is a mandatory requirement. RK Nathan J in dealing with reg 11(1) of the 1989 Regulations (which in effect is the same with reg 12 (1) of the 1982 Regulations) in *Chua Eng Hong & Anor v Palm Springs Development Sdn Bhd* [2001] 6 MLJ 463 has made the same ruling ie that the sale and purchase agreement was in the statutory form and must be complied with and cannot be waived or modified except with the approval in writing from the controller.

Since the sale and purchase agreement was in the statutory form and by law, the approved building plan need to be annexed to the sale and purchase agreement, therefore the said approved building plan must be deemed to have been annexed and incorporated into the sale and purchase agreement although in actual fact the plan was not annexed to the sale and purchase agreement at all. Thus the provisions and specifications contained in the approved building plan must be deemed to form part of the agreement and bind the parties concerned.

Hence, the maxim 'equity treats as done that which ought to have been done' must apply to the present case. This was supported by Shanker J in *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289 when he said:

There was an immediate legal duty upon the part of Metroplex to reassign their rights under the agreement which they failed to do. Equity in this respect must regard that as done which ought to have been done.

In the present case, there was no evidence to show that the approved building plan, which was prepared by the appellant/defendant's architect, has been annexed to the sale and purchase agreements. The appellant/defendant may have committed an offence under reg 14 of the 1982 Regulations. Thus, the appellant/defendant should not be allowed to take advantage of his own wrong doing. In any event it is the law that no man can take advantage of his own wrong doing: '*nullus commodum capere potest*

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- A *defendant injuria sua propria*' (see *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming & Ors* [1995] 4 MLJ 328).

- B Fourth issue: Whether, upon issuance of the certificate of fitness for occupation ('CFO'), the respondents/plaintiffs as house buyers are entitled to claim compensation from the appellant/defendant for non-compliance with the specifications or any defect to the houses

- C The appellant/defendant argued that since the CFO to those houses were issued by the relevant authority, certifying that the houses were fit for occupation, the respondents/plaintiffs are not entitled to claim that the houses were defective for non-compliance with the specifications, and also not entitled to claim compensation from the appellant/defendant. However, the appellant/defendant did not cite any authorities to support this argument.

- D With respect, I cannot agree with this argument. I am of the view that the CFO, which in the present case, was issued by the relevant authority on 30 April 1991 (according to PW4), is to certify that the house in question is deemed fit for occupation. It is issued upon completion of the house by the developer and after the relevant authority is satisfied that the relevant provisions of the Uniform Building By Laws 1984 (GN5178/85) ('UBBL') have been complied with. The UBBL sets the minimum standards and specifications for the houses in question. However, the sale and purchase agreements together with the approved building plan are separate documents. The specifications to the houses as contained in the sale and purchase agreement and the approved building plan may be different (but shall not be less favourable) compared to the specifications in the UBBL. So, if the developer has satisfied the specifications in the UBBL, it does not necessarily mean that he has also satisfied or fulfilled the specifications in the sale and purchase agreement and the approved building plan.

- E The rights of the house buyers to claim compensation for any defect or non-compliance with the specifications, do not depend on the issuance of the CFO. These rights are provided under cl 23 to the sale and purchase agreement as well as under the common law for breach of contract. Clause 23 provides for defect liability period of 12 months after the date of delivery of vacant possession to the house buyers. Manner of delivery of vacant possession is provided under cl 19, ie upon the issue by developer's architect of a certificate certifying that the construction of the building has been duly completed and the purchaser having paid all monies payable and performed or observed all the terms and covenants on his part under the sale and purchase agreement. However, such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said house until such time as the CFO is issued. It is the duty of the developer to procure the issue of the CFO from the appropriate authority as provided under cl 20 of the sale and purchase agreement. In reality, some defects or non-compliance of specifications can only be discovered when the purchaser has occupied the house for sometime. That is why, cl 23 gives a grace period of 12 months for the purchaser to discover the defects and non-compliance of

specifications. After that 12 months period, purchaser may still enforce their rights under the common law for breach of contract. If the appellant/defendant's argument is to be accepted, then the rights and protection granted to house buyers under cl 23 as well as under the relevant laws, particularly the Housing Developers (Control and Licensing) Regulations 1982 (now as amended in 1989) and the common law for breach of contract, would be useless and serve no purpose at all.

Conclusion

In view of the foregoing, I dismiss all the 26 appeals against all the respondents/plaintiffs with costs. Decisions of the learned magistrate in all the 26 cases are upheld.

All 26 appeals dismissed.

Reported by Chan Chin Chye

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